Before the

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Rules and Regulations Implementing

The Telephone Consumer Protection Act of 1991

[CG Docket No. 02-278, FCC 03-62]

Comment of the

FEDERAL TRADE COMMISSION

In an October 18, 2002, Federal Register notice, the Federal Communications Commission ("FCC") solicited comment on "whether to revise, clarify or adopt any additional rules in order to more effectively carry out Congress's directives in the Telephone Consumer Protection Act of 1991 (TCPA)."[1] Subsequently, on January 29, 2003, the Federal Trade Commission announced the conclusion of its rulemaking proceeding to amend the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, by adopting new provisions that, among other things: establish a national do-not-call registry and prohibit sellers and telemarketers from calling consumers whose numbers are entered on that registry; require telemarketers to transmit Caller ID information; and prohibit telemarketers from abandoning calls answered by consumers.[2] Shortly thereafter, on March 11, 2003, President Bush signed the Do-Not-Call Implementation

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[1] 67 Fed. Reg. 62667 (Oct. 18, 2002).

[2] 68 Fed. Reg. 4580 (Jan. 29, 2003). This is the Statement of Basis and Purpose for the Amended TSR, which can also be accessed online at http://www.ftc.gov/os/2003/01/tsrfrn.pdf. Subsequent references to the Amended TSR Statement of Basis and Purpose in this Comment will be to "Amended TSR SBP at ____." Citations to comments and other evidence on the TSR amendment rulemaking record follow the format used in the Amended TSR SBP, which is explained in that document at 4581 in footnote 23.

Act,[3] authorizing the FTC to impose and collect fees from telemarketers to support the national do-not-call registry, and directing that the FCC, in issuing its revised TCPA regulations, should "maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. 310.4(b))." Do-Not-Call Implementation Act § 3.

Accordingly, on April 3, 2003, the FCC published in the Federal Register a Further Notice of Proposed Rulemaking[4] to solicit comment on the Do-Not-Call Implementation Act, pursuant to its TCPA regulatory review. The FCC primarily requested comment on how it should consider amending its rules to maximize consistency with the FTC's rule. This document sets forth the FTC's views on how this could be accomplished.

I. The FCC can maximize consistency with the FTC's Amended TSR by amending the TCPA regulations to prohibit entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a person when that person previously has placed his or her telephone number on the national do-not-call registry established pursuant to the Amended TSR and the Do-Not-Call Implementation Act.

The FCC possesses the legal authority to amend its TCPA regulations to complement and harmonize with the Amended TSR by prohibiting entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a number that has been placed on the national do-not-call registry established by the FTC pursuant to the Amended TSR and Do-Not-Call Implementation Act. To do so would be entirely consistent with the TCPA directive that the FCC prescribe regulations to protect residential telephone subscribers' privacy rights to be free from unwanted telemarketing calls. 47 U.S.C. § § 227(c)(1) & (2).

The FCC has authority under two separate statutory provisions to mandate the use of a do-not-call database as a method to protect consumers from unwanted telemarketing calls. First,

[3] Do-Not-Call Implementation Act, P.L. 108-10, 117 Stat. 557 (2003).

[4] 68 Fed. Reg. 16250 (Apr. 3, 2003).

the FCC has authority to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase." 47 U.S.C. § 227(c)(3). The statute identifies twelve criteria that must be met by the FCC regulations if the agency opts to establish such a database, 47 U.S.C. § 227(c)(3)(A)-(L), and lists three additional considerations that the agency must take into account, 47 U.S.C. § 227(c)(4)(A)-(C).

Second, the TCPA broadly authorizes the FCC to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do-not-call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting [telephone subscribers'] privacy rights, and in terms of their cost and other advantages and disadvantages;" and to "develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section." 47 U.S.C. § 227(c)(1)(A) & (E) (emphasis supplied). Thus, requiring the establishment and operation of a do-not-call database is only one of many possible alternatives the FCC can choose to accomplish the privacy protection objectives of the TCPA.

The FTC believes that the FCC should refrain from establishing a separate do-not-call database pursuant to TCPA § 227(c)(3). Because such a database has already been established pursuant to the Amended TSR and the Do-Not-Call Implementation Act, it would be duplicative and inefficient for the FCC to create a second national do-not-call database. Establishing a second database also would be contrary to the express directives of the TCPA to "develop . . . regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish" the privacy protection goals of the statute. 47 U.S.C. § 227(c)(1)(E).[5] Thus, the TCPA clearly evidences Congressional intent to avoid unnecessary expense in implementing do-not-call regulations, and to optimize the effectiveness and efficiency of those regulations.

[5] Indeed, the TCPA only authorizes the establishment of a "single" national database.

Instead, the FTC urges the FCC to adopt new regulations that make use of the do-not-call database already established by the FTC's Amended TSR. Adopting such regulations would qualify as an "alternative method" for protecting telephone consumer's privacy authorized by TCPA § 227(c)(1)(A). Thus, the FCC could fulfill TCPA § 227(c)(2) by prescribing regulations that prohibit entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a person when that person previously has placed his or her telephone number on the national do-not-call registry. Such a prohibition is obviously distinguishable from requiring "the establishment and operation of a single national database" as permitted, but not required, by TCPA § 227(c)(3). This approach would give full effect to the directives of both the TCPA and the Do-Not-Call Implementation Act.

As stated, the FTC believes that if the FCC were to adopt revised TCPA regulations that reference and require use of the national do-not-call registry already established by the FTC, such action would not constitute an exercise of the FCC's authority under TCPA § 227(c)(3) to require the establishment and operation of a do-not-call database. Rather, the FTC believes that such action is authorized by TCPA §§ 227(c)(1)(A) & (E). Nevertheless, if the FCC takes the view that linking its TCPA regulations to the FTC's national do-not-call registry must be done under TCPA § 227(c)(3) and that the directives of TCPA §§ 227(c)(3)(A)-(L) and (4)(A)-(C) must be met, the FTC believes that this can be done. The following sections paraphrase each of the directives of §§ 227(c)(3)(A)-(L) and (c)(4)(A)-(C) and explain how the FCC's regulations – if amended as we suggest – could fulfill each of them.

A. The regulations must specify a method by which the FCC will select an entity to administer the database. TCPA § 227(c)(3)(A).

This requirement could be satisfied by specifying in the revised TCPA regulations that the FCC, based on the applicable statutory directives, selects the FTC to administer the do-not-call registry for entities within FCC jurisdiction. Alternatively, the FCC could specify the process the FTC followed in soliciting and accepting bids from commercial vendors to maintain the registry, and adopt this process in the regulations as a method of fulfilling this TCPA requirement.

The FTC has followed a multi-step process in selecting an entity to administer and operate the national do-not-call registry database. The FTC issued a Request for Information to interested vendors on February 28, 2002. (This document may be accessed online at http://www.ftc.gov/ftc/oed/fmo/procure/requestforinformation.htm.) On August 2, 2002, the FTC issued a Request for Quotes ("RFQ") to selected vendors on GSA Schedules, seeking their proposals to develop, implement, and operate the national registry. After evaluating those proposals, the FTC selected a competitive range of those vendors and issued an amended RFQ to those vendors on November 25, 2002. (The performance work statement of the amended RFQ can be accessed at http://www.ftc.gov/foia/pwsamend.pdf.) After a further evaluation of the competitive range, the FTC selected AT&T Government Solutions as the successful vendor on March 1, 2003.

B. The regulations must require each common carrier providing telephone exchange service to inform subscribers of the opportunity to provide notification that the subscriber objects to receiving telephone solicitations. TCPA § 227(c)(3)(B).

This requirement could be satisfied by including a provision in the revised TCPA regulations requiring common carriers to inform their subscribers, in whatever reasonable manner the FCC should determine, of the opportunity to sign up for the existing national do-not-call registry, thereby providing notification to potential callers that the subscriber objects to receiving telephone solicitations. As a model to fulfill this requirement [and the one contained in TCPA § 227(c)(3)(C), discussed immediately below], the FCC may wish to consider its regulations under the Telephone Disclosure and Dispute Resolution Act, 47 C.F.R. § 64.1509(b)(2), that require carriers to provide a disclosure statement to subscribers regarding their right to block 900-number charges, and their right not to have their basic telecommunications service disconnected based on disputing a 900-number charge.

C. The regulations must specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of the subscriber's right to give or revoke a notification of an objection, and the methods by which such right may be exercised by the subscriber. TCPA § 227(c)(3)(C).

This requirement could be satisfied by including a provision in the revised TCPA regulations setting forth the methods a common carrier may use to inform its subscribers of (1) their rights to sign up for the existing national do-not-call registry, and to cancel their registration should they subsequently decide to do so; and (2) how subscribers may exercise those rights. (The national do-not-call registry will permit consumers to sign up, verify, and/or delete their registrations using either the toll-free telephone number of the Internet website.) Again, 47 C.F.R. § 64.1509(b)(2) might serve as a useful model for accomplishing this.

D. The regulations must specify the methods that consumers can use to place their numbers in the database. TCPA § 227(c)(3)(D).

This requirement could be satisfied by including provisions in the revised TCPA regulations describing the method consumers can follow to enter their telephone numbers into the existing national do-not-call registry.[6] Basically, there are two methods: consumers can sign up via a toll-free telephone call or via the Internet. Consumers who choose to register by phone must call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response ("IVR") system. After a brief introductory message, the consumer will be asked to enter on his or her telephone keypad the telephone number from which the consumer is calling. The number entered will be checked against the automatic number information ("ANI") that is transmitted with the call. If the telephone number the consumer enters on the keypad matches the ANI of the line from which the consumer is calling, then the IVR system will inform the consumer that the number is registered and the call will end. If the telephone number does not match, the IVR system will advise the consumer to

[6] The discussion in the Amended TSR SBP of how consumers will sign up for the registry is at 4638-39. In addition, this process is also set forth in Sections C-5.2 through C-5.2.5.1. of the performance work statement of the FTC's amended RFQ, accessible at http://www.ftc.gov/foia/pwsamend.pdf.

call back from the telephone the consumer wishes to register. In the small percentage of calls in which ANI is not available, the system will offer other verification options.

Using this process, the FTC system will verify, at a minimum, that each consumer is calling from a telephone line assigned the number the consumer is attempting to register. The FTC determined that this is sufficient verification for the limited purposes involved here – ensuring that a telephone number in the national registry was entered by someone in the household to which that telephone number is assigned.

Based on comments expressing concern that third-party registrations could lead to abuse[7] and urging that the FTC prohibit third parties from registering consumers' preference not to receive telemarketing calls with the national do-not-call registry, the FTC determined that third party registrations will not be permitted. (The states and the Direct Marketing Association will be permitted, however, to transfer into the national registry the telephone numbers they have compiled pursuant to their do-not-call programs.) The FTC believes that the verification procedures for telephone registrations will prevent potential third-party abuse, because the person registering will have to be present physically in the household with which the telephone number being registered is associated.

[7] See, e.g., DialAmerica-NPRM at 13; Household-NPRM at 13; Texas PUC-NPRM at 2; PMA-NPRM at 29. The fear was that a company might sign up its entire customer list, thereby preventing competitors from calling them. NAAG also cited recent state cases against companies that have deceptively offered to add consumers' numbers, for a fee, to "do-not-call" lists. See NAAG-NPRM at 19, n.47.

Consumers who choose to register via the Internet will go to the national do-not-call registry website where they will be asked to enter the telephone number they wish to register. As with the telephone registration system, the consumer will be reminded that if he or she shares a household number with others, he or she is registering on behalf of all household members.[8] Verification will be accomplished by asking the consumer to enter his or her email address; the system will send a confirming email to that address, and the consumer will then have to respond to confirm his or her registration decision. This verification process will enhance the likelihood that individuals will register only their own telephone numbers. The system will include procedures that prevent large numbers of registrations from being confirmed through the same email account. The FTC determined that these are sufficient verification procedures for the limited purpose of adding telephone numbers to the national do-not-call registry, and should help prevent the potential abuses cited concerning massive third-party registrations.

For both telephone and Internet registrations, the only personal identifying information that will be maintained by the national do-not-call registry will be the consumer's telephone number. Based on our discussions with the states, that appears to be the only piece of information that telemarketers need.[9] Therefore, the do-not-call registry will not collect extraneous information, such as consumers' names and addresses.

Consumers will be able to verify their registration status and cancel their registration using either the telephone or Internet. The same verification procedures established for the initial registration will apply to these requests as well. Allowing consumers to verify their registration

[8] Amended TSR SBP at 4639.

[9] In fact, based on discussions between the states and FTC staff, it appears that in states where additional information is provided to telemarketers, the states have received requests to strip their lists of all information except the telephone number.

status and to cancel their registrations if they so desire offers yet another method to enhance the accuracy of the national registry.

The FTC determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected. The FTC sought to minimize the inconvenience to consumers entailed in periodically re-registering their preference not to receive telemarketing calls.[10] Nevertheless, the length of time registrations remain valid directly affects the overall accuracy of the national registry. A number of commenters stated that 16 percent of all telephone numbers change each year, and that 20 percent of all Americans move each year.[11] To ensure the accuracy of the information included in the national do-not-call registry, the system includes a procedure to check periodically all telephone numbers in the registry against national databases, and to purge from the registry those telephone numbers that have been disconnected. The FTC determined that a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to re-register their telephone numbers periodically.[12]

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[10] Consumer inconvenience includes not just the time and effort necessary to register, but also the need to remember when it is time to re-register. Of course, requiring frequent consumer re-registrations also increases the costs of operating the national registry. Several commenters supported allowing registrations to continue indefinitely, until the consumer's phone number is disconnected or he requests that his number be removed. See, e.g., New Orleans at 9; NCL at 9. In addition, 15 states with do-not-call registries do not specify a renewal period for registrations in their do-not-call statutes (Alabama, Alaska, California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, South Dakota, and Tennessee).

[11] See DMA-NPRM at 12; Nextel-NPRM at 26; Household-NPRM at 13; SBC-NPRM at 11. Of course, not all consumers who move change their telephone numbers. For consumers who keep their existing telephone numbers when they move, no action by either the consumer or the Commission is necessary to maintain the registry's accuracy.

[12] The DMA's "Telephone Preference Service" ("TPS") is operated in a similar manner. TPS registrations remain valid for five years. During that five-year period, the DMA checks the information in the TPS against the U.S. Postal Service's National Change of Address List, purging the telephone numbers of those registered consumers who have moved. DMA-NPRM at 7, 12.

If the FCC includes provisions in the revised TCPA regulations that specify how subscribers may sign up for the registry, the FTC suggests that they be flexible so that they can adapt to possible adjustments over time in the way the registry system functions.

E. The regulations must prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in the national do-not-call registry database. TCPA § 227(c)(3)(E).

This requirement could be satisfied by including a provision in the revised TCPA regulations specifying that consumers may, without charge, register their preference not to be called by sellers or telemarketers within the FCC's jurisdiction either by calling a toll-free telephone number or by registering over the Internet. The FTC has made clear that there is no charge for consumers to register on the FTC's national-do-not-call registry.[13] Similarly, there will be no charge for consumers to revoke their registration, should they desire to do so.

F. The regulations must prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in the national do-not-call registry database. TCPA § 227(c)(3)(F).

This requirement could be satisfied by including a provision in the revised TCPA regulations analogous to Amended TSR § 310.4(b)(1)(iii)(B), which provides that it is an abusive practice and a violation of the rule to engage in the practice of:

> initiating any outbound telephone call to a person when that person's telephone number is on the "do-not-call" registry, maintained by the [FTC], of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller (i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or (ii) has an established business relationship with such person, and that person has not stated

[13] See "Q & A: the FTC's changes to the Telemarketing Sales Rule," a consumer information piece available at http://www.ftc.gov/bcp/conline/pubs/alerts/dncalrt.htm (stating that consumers will be able to sign up for free on line or by calling a toll free number).

that he or she does not wish to receive outbound telephone calls [in the company-specific context]. (footnote omitted)[14]

G. The regulations must (1) specify the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database and (2) specify the costs to be recovered from such persons. TCPA § 227(c)(3)(G).

[14] The discussion of the FTC's reasons for adopting this Amended TSR provision is in the Amended TSR SBP at 4628-34.

This requirement could be satisfied by including a provision in the revised TCPA regulations specifying how telemarketers and sellers can gain access to the do-not-call registry database so that they can "scrub" their call lists or otherwise "block" calls to consumers who have registered a desire not to be called.[15] The telemarketer and seller access component of the registry entails a fully-automated, secure website dedicated to providing database access to telemarketers and sellers. The first time a telemarketer or seller accesses the system, it will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.

The only consumer information telemarketers and sellers will receive from the national registry is the registrants' telephone numbers. Those telephone numbers will be sorted and available by area code. Telemarketers and sellers will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state or region of the country. Of course, telemarketers and sellers also will be able to access the entire national registry, if desired.

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[15] An initial discussion of how telemarketers and sellers would be able to access the database for purposes of compliance is in the Amended TSR SBP at 4640-41. This procedure is also discussed in the Revised Notice of Proposed Rulemaking concerning fees for access to the national registry. See 68 Fed. Reg. 16238 at 16244-54 (Apr. 3, 2003). Because this proposed rule is still subject to comment, the FTC, based on the comments, may ultimately decide to establish somewhat different procedures for telemarketer and seller access to the national registry. Sections C-5.3 through C-5.3.5.1. of the performance work statement of the FTC's amended RFQ, accessible at http://www.ftc.gov/foia/pwsamend.pdf, also describes this aspect of the registry.

When a seller or telemarketer first submits an application to access registry information, the company will be asked to specify the area codes that it wants to access.[16] Sellers accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the company accesses. Fees will be payable via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the seller to wait for the funds to clear before data access will be provided).

After payment is processed, the seller will receive an account number and will be permitted access to the appropriate portions of the registry. That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit.

Telemarketers, list brokers, and other entities working on behalf of sellers will need to submit their client-seller's account number to gain access to the national registry. The extent of this access will be limited by the area codes requested and paid for by the client-sellers. Telemarketers and sellers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid. As indicated in the discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or a telemarketer to employ a version of the do-not-call registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

[16] The company will be able to amend the list of area codes for which it seeks data on future visits, provided it pays the appropriate fee for the additional area codes.

Regarding the amount of the fees, on May 29, 2002, the FTC issued a Notice of Proposed Rulemaking to add a provision to the Amended TSR § 310.9 to establish a "user fee" for telemarketer access to the national do-not-call registry.[17] After reviewing the comments received in response to that NPRM, the FTC issued a revised NPRM on April 3, 2003, seeking additional comment on the fee issue and proposing a new TSR § 310.8 setting the fees.[18] The NPRM set October 1, 2003, as the effective date for the do-not-call provisions of the Amended TSR, and proposed, among other things: to require only sellers to pay the annual fee for access to the national registry; to set the annual fee at $29 per area code, with a maximum annual fee of $7,250; and to allow access to up to five area codes for free. The comment period on the Revised NPRM runs through May 1, 2003, after which the FTC will issue a final Amended TSR provision setting fees.

H. The regulations must specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operation of the database that are incurred by the entities carrying out those activities. TCPA § 227(c)(3)(H).

This requirement could be satisfied by including a provision in the revised TCPA regulations referencing Amended TSR § 310.8, governing the fees for access to the database by sellers and telemarketers,[19] and by citing to the Do-Not-Call Implementation Act in its authorization for the FTC "to promulgate regulations establishing fees sufficient to implement

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[17] 67 Fed. Reg. 37362 (May 29, 2002). This document can be accessed on line at: http://www.ftc.gov/os/2002/05/16cfrpart310.htm.

[18] 68 Fed. Reg. 16238 (Apr. 3, 2003). The text of this document can be accessed on line at: http://www.ftc.gov/os/2003/03/030327tsrfrn.htm. The April 3, 2003 notice was published pursuant to the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7 (2003) which, among other things, authorized the FTC to collect fees sufficient to implement and enforce the do-not-call provisions of the TSR, and the Do-Not-Call Implementation Act, Pub. L. No. 108-10 (2003) and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-08. The May 29, 2002, notice had been published pursuant to the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701.

[19] Sections C-5.3.2 – C-5.3.3.4 of the performance work statement of the FTC's amended RFQ also describes this aspect of the registry.

and enforce the provisions relating to the do-not-call registry of the Telemarketing Sales Rule (16 C.F.R. 310.4(b)(1)(iii))."

I. The regulations must specify the frequency with which the database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection. TCPA § 227(c)(3)(I).

This requirement could be satisfied by including a provision in the revised TCPA regulations referencing the fact that the national do-not-call registry system will automatically incorporate registrations into the database within 24 hours after the consumer registers. Thus, the database will be constantly updated as new registrations come in to the system. The TCPA regulations should also harmonize with the Amended TSR provision that requires sellers and telemarketers to scrub their call lists "employing a version of the do-not-call registry obtained from the Commission no more than three (3) months prior to the date any call is made" and to maintain records documenting this process. Amended TSR § 310.4(b)(3)(iii).[20]

J. The regulations must enable States to use the database mechanism for purposes of administering or enforcing State law. TCPA § 227(c)(3)(J).

[20] The FTC's reasons for adopting this Amended TSR provision are set forth in the Amended TSR SBP at 4645 - 47.

This requirement could be satisfied by including a provision in the revised TCPA regulations that references the national do-not-call registry features that will enable any law enforcement agency that has responsibility to enforce either the TSR[21] or any state do-not-call statute or regulation to access appropriate information in the national registry.[22] The system will provide this information through a secure Internet website, with access obtained through the FTC's existing Consumer Sentinel® system. Law enforcers will be able to query the registry to determine if and when a particular telephone number was registered by a consumer. They can also query if and when a particular telemarketer or seller accessed the registry, and the information accessed by that telemarketer or seller. Finally, they will be able to access all consumer do-not-call complaints filed with the national registry. Such law enforcement access to data in the national registry is critical to enable state Attorneys General and other appropriate law enforcement officials to gather evidence to support enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and, once harmonization between the national registry and state do-not-call programs has been completed, to support law enforcement action under state law as well.

The FTC is working with the states to develop a single, national do-not-call registry. The goals are to enable consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency, and to enable telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose. To further those goals, the FTC will allow all states to download into the national registry—at no cost to the states—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls.

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[21] The Telemarketing and Consumer Fraud and Abuse Prevention Act provides that any state attorney general (or other appropriate state official), "as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with [the TSR], to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate." 15 U.S.C. § 6303.

[22] The discussion of the law enforcement access features of the national do-not-call registry is in the Amended TSR SBP at 4641. Sections C-5.4 through C-5.4.2.3. of the FTC's amended RFQ also describes this aspect of the registry.

Telemarketers and sellers will be allowed to access that data through the national registry as the information is received.

It will take some time to achieve these goals completely, however. By the time telemarketers first gain access to the national registry, some states will have been able to transfer their state do-not-call registration information and will have ceased requiring telemarketers to access the state registries. For other states, it may take from 12 to 18 months to achieve those results. At least one state, Indiana, may need up to three years before it can become part of the national system. In any event, the FTC will continue to work diligently with the states in an effort to harmonize these different systems.

K. The regulations must (1) prohibit the use of the database for any purpose other than compliance with the requirements of this section and any such State law and (2) specify methods for protection of the privacy rights of persons whose numbers are included in such database. TCPA § 227(c)(3)(K).

This requirement could be satisfied by including provisions in the revised TCPA regulations analogous to Amended TSR § 310.4(b)(2). Section 310.4(b)(2) provides that "it is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the [FTC] pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists."[23]

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[23] The FTC's reasons for adopting Amended TSR § 310.4(b)(2) are set forth in the Amended TSR SBP at 4645. In addition, the FTC has also proposed TSR § 310.8(3), which would provide that:

> [a]ccess to the do-not-call registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, service providers acting on behalf of such persons, and any government agency that has the authority to enforce a federal or state do-not-call statute or regulation. Prior to accessing the do-not-call registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the

The requirement to specify methods for protection of privacy rights of persons who sign up for the registry could be met by incorporating into the revised TCPA regulations the features of the national do-not-call registry that are designed for this purpose, as outlined above, in the discussion of TCPA § 227(c)(3)(D).[24]

L. The regulations must require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder. TCPA § 227(c)(3)(L).

> registry on behalf of other sellers, that person also must identify each of the other sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the other sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

The FTC's reasons for proposing this Amended TSR provision may be found at 68 Fed. Reg. 16329 (April 3, 2003). The FCC could also include in its revised TCPA regulations provisions analogous to the final form of proposed TSR § 310.8(3).

[24] See pp. 6-9, supra.

This requirement could be satisfied by including a provision in the revised TCPA regulations requiring disclosure, in whatever manner the FCC determines to be reasonable, by common carriers to their telemarketing clients that would describe the requirements of the TCPA and the TCPA regulations.[25]

M. In developing procedures for gaining access to the database, the FCC must consider the different needs of telemarketers conducting business on a national, regional, state, or local level. TCPA § 227(c)(4)(A).

In developing the method whereby telemarketers will access the national registry, the FTC has taken the needs of telemarketers of varying sizes, and with varying regional coverage, into account. The national do-not-call registry will enable telemarketers to download selected files of telephone numbers, by area code, that are included in the national registry. For example, telemarketers who call consumers in only one state will be able to limit their access to only the telephone numbers in the national registry from that state by downloading only the files in the area codes within that state. The system will provide for cases when the amount of data needed is too large to be downloaded in one batch – for example, by providing a system feature whereby sorted lists of telephone numbers included in the registry may be viewed and downloaded via indexed web pages. Finally, for small telemarketers, five or fewer area codes may be downloaded without charge; in addition, the national registry will provide a "single number lookup" feature, whereby a small number of telephone numbers can be entered on a web page to determine whether any of those numbers are included on the national registry.

[25] If the FCC mandates that carriers disclose the requirements of the TCPA and the TCPA regulations to their telemarketing clients, the FTC urges that the required disclosures also encompass a reference to the relevant Amended TSR provisions.

N. The fee schedule or price structure for recouping the cost of the database must (1) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations; (ii) reflect the relative costs of providing such lists on paper or electronic media; and (iii) not place an unreasonable financial burden on small businesses. TCPA § 227(c)(4)(B).

The proposed fee schedule addresses each of these considerations. It would charge each seller based on the amount of information that the seller needs to access – namely, by the number of area codes of do-not-call data that the seller obtains. This reflects the relative costs of gathering and disseminating the information, because each additional telephone number included in the national registry increases such costs. The fee schedule also reflects the fact that providing the data electronically via the Internet is by far the cheapest and most efficient way to do it. The proposed fee schedule places high priority on minimizing the impact such fees may have on small businesses by providing free access to any company that seeks do-not-call data from five or fewer area codes and by providing a single number lookup feature.

O. Consideration must be given to whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix. TCPA § 227(c)(4)(C).

There is no basis to believe that any segment of the telemarketing industry needs or would prefer special markings of area white pages directories as an alternative to the Internet-based do-not-call registry system under development. Throughout the various public workshop forums and notice and comment periods that the FTC has conducted in connection with the regulatory review of the TSR and the amendment rulemaking proceeding, no industry member has proposed or advocated such markings as an alternative approach to obtaining consumer do-not-call preferences. The FTC believes the needs of telemarketers operating on a local basis will be met through the five free area codes and "single number lookup" features, discussed above.[26]

[26] In this regard, it is noteworthy that Alaska and Oregon, two of the three states that have so-called "black dot" do-not-call laws, are currently considering proposed legislation to replace this scheme with a central do-not-call list.

II. The directive in the Do-Not-Call Implementation Act for the FCC, in revising its TCPA regulations, to "maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. 310.4(b))," encompasses more than the national do-not-call registry.

It is plain from the title of the Do-Not-Call Implementation Act that the do-not-call registry was a central concern of Congress in enacting that legislation. Nevertheless, § 3 of the Act mandates consistency with "the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b)" (emphasis supplied). The do-not-call provisions[27] are a key component of Amended TSR § 310.4(b), but that section of the TSR also contains a number of other provisions. Thus, on its face, the Act's reference encompasses more than just do-not-call.[28] TSR § 310.4(b) also includes provisions that:

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[27] The provisions that establish and govern the operation of the national do-not-call registry are at §§ 310.4(b)(1)(iii)(B) and (b)(3).

[28] The legislative history also indicates that the Act's intent is to mandate consistency with respect to matters other than do-not-call. The Committee on Energy and Commerce report on the legislation notes the need to avoid conflict between the treatment of recorded messages in the TSR's call abandonment safe harbor and in the TCPA. H.R. REP. NO. 108-8 at 4 (2003). The report also noted in passing that both the TSR and the TCPA regulations address calling time restrictions and that both contain established business relationship exemptions. Id. at 2, 3. Do-not-call was the dominant theme of the floor debate, but Congressman Frelinghuysen did note that the TSR encompasses mandatory transmission of Caller ID information and Congressman Kirk mentioned the problem of call abandonment due to predictive dialers. CONG. REC. H410 (2003).

- Prohibit outbound telemarketing calls to any person who has previously requested to be placed on the seller's or telemarketer's company-specific do-not-call list;

- Prohibit denying or interfering in any way, directly or indirectly, with a person's right to be placed on the national do-not-call registry or any company-specific do-not-call list;

- Prohibit selling, renting, leasing, purchasing, or using any company-specific do-not-call list or any list downloaded from the national do-not-call registry "for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists;"

- Establish a "safe harbor" for sellers or telemarketers who, despite good faith efforts to comply with the do-not-call provisions, erroneously call a person who previously has asked to be placed on a company-specific do-not-call list or has placed his or her number on the national do-not-call registry;

- Prohibit abandoning any outbound telephone call, while establishing a "safe harbor" so that telemarketers need not sacrifice the use of predictive dialers; and

- Prohibit causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

This Part of this Comment sets forth the FTC's views on how the Do-Not-Call Implementation Act's directive to maximize consistency can be fulfilled with respect to each of the provisions of TSR 310.4(b) listed above. Because several of these provisions raise important issues relating to the scope and application of the "established business relationship" exemption, the first section in this Part, immediately below, addresses how regulatory consistency can be achieved with respect to the established business relationship exemption.

A. Scope and Application of the "Established Business Relationship" Exemption.

The TCPA's definition of the term "telephone solicitation" expressly excludes any call or message "to any person with whom the caller has an established business relationship." 47 U.S.C. § 227(a)(3)(b). Although the TCPA does not define "established business relationship," the FCC's regulations supply the following definition:

> The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party. 47 C.F.R. § 64.1200(f)(4) (emphasis supplied.)

The term "established business relationship" comes into play in three contexts in the current TCPA regulations. First, "established business relationship" calls are excluded from the provisions that prohibit the use of any "artificial or prerecorded voice to deliver a message" in a call to a residential telephone line. 47 C.F.R. §§ 64.1200(a)(2) & (c)(3). The effect of this exclusion is to permit telemarketers to use prerecorded messages in calling any consumer with whom they have an "established business relationship." Second, "established business relationship" calls are excluded from the provisions that prohibit a telephone solicitation to a person who has asked to be on the seller's do-not-call list. 64 C.F.R. §§ 64.1200(e)(2) & (f)(3). Third, "established business relationship" calls are excluded from the calling time restrictions. 64 C.F.R. §§ 64.1200(e)(1) & (f)(3).

The FTC recently defined the term "established business relationship" in its Amended TSR. For the reasons discussed below, the term is defined differently there than in the current TCPA regulations and is used in the Amended TSR only in the context of the national do-not-call registry. In crafting the definition for the Amended TSR, the FTC looked to the FCC's definition as well as to definitions in state "do-not-call" laws, most of which have some sort of exemption for calls to consumers with whom a caller has an established business relationship. There is an important difference between the TCPA regulations and the state laws in their definition of the term "established business relationship." Many state laws circumscribe the scope of an

established business relationship by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.

The FTC determined that circumscribing the scope of the exemption in this manner is more consistent with consumer expectations than an open-ended exemption. In addition, because the FTC was creating an exemption from the national do-not-call list for calls made pursuant to an "existing business relationship," the FTC believed that the exemption should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers. Therefore, in the Amended TSR § 310.2(n), the FTC determined to define the term "established business relationship" as follows:

> Established Business Relationship means a relationship between a seller and a consumer based on:
>
> (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
>
> (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

A more complete discussion of the FTC's reasons for adopting this definition is set forth in the Amended TSR SBP at 4591-94, and is incorporated by reference into this Comment.[29]

[29] The discussion of the FTC's reasons for including an "established business relationship" exemption in the national do-not-call registry provisions of the Amended TSR is fully set forth in the Amended TSR SBP at 4623-27 and is also incorporated by reference into this Comment.

The FTC urges the FCC to consider adopting a revised definition of "established business relationship" analogous to the definition in Amended TSR § 310.2(n). A narrowly tailored definition would be especially important to maintain an effective and consistent approach to a national-do-not call registry. In addition, a narrower definition would better serve to protect consumers' privacy, because it would conform more closely to consumers' reasonable expectations, which Congress intended to be the touchstone of the "established business relationship" exemption.[30]

[30] Two themes emerge from the legislative history of the TCPA with respect to the "established business relationship" exemption. The first is that Congress intended for the reasonable expectation of the consumer to be the touchstone of the "established business relationship" exemption. "In the Committee's view, an "established business relationship" also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call." H.R. REP. NO. 102-317 at 14, 15 (1991). The second theme is that Congress exempted "established business relationship" calls "so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship." Id. at 13. Throughout the House Report discussing the exemption for "established business relationship," the point is stressed that the exemption is

The FTC has further comments on the specific provisions that use the existing business relationship definition – that is, the exemption from the use of artificial or prerecorded voices to deliver a message, the exemption from the prohibition on calls to consumers who have asked to be on the seller's do-not-call list, and the exemption from the calling time restrictions. The FTC will address these particular provisions in parts II.B, II.F, and III.B.below.

B. The FCC should retain in its revised TCPA regulations a prohibition against placing outbound telemarketing calls to any person who has previously requested to be placed on the seller's or telemarketer's company-specific do-not-call list.

As discussed above, the FTC believes that the national do-not-call registry should become a part of the TCPA regulations to fulfill the intent of Congress and improve the efficacy of the FCC's TCPA regulations. The FTC also believes that the existing TCPA company-specific do-not-call option remains important in the overall regulatory scheme so that consumers will have the broadest possible range of choices in the matter of receiving telemarketing calls. In this way consumers who prefer to receive as few telemarketing calls as possible can sign up for the national registry and receive only telemarketing calls from companies with whom they have an established business relationship and to whom they have not asserted a company-specific do-not-call request. Meanwhile, consumers who do not object to telemarketing generally, but may want to avoid calls from certain companies, can do so by asserting a company-specific do-not-call request and not signing up for the national registry. For these reasons, the FTC urges the FCC to adopt regulations that make use of the national do-not-call registry established by the Amended TSR and also retain the FCC's company-specific do-not-call regulations.

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intended to reach only those relationships that are current or recent. The Report consistently refers to an "established business relationship" in terms of "the existence of the relationship at the time of the solicitation, or within a reasonable time prior to it."

The FTC, however, believes the FCC should consider revising the company-specific do-not-call provisions in the TCPA regulations. Under the Amended TSR, the established business relationship exemption only applies to those consumers who have placed their telephone numbers on the national do-not-call list. A company may call a consumer with whom it has an established business relationship, even if that consumer has placed his or her number on the national do-not-call registry. If that consumer asks to be placed on the company's do-not-call list, the company may not call the consumer again. Thus, the company-specific do-not-call option empowers consumers to stop telemarketing calls from companies with whom they have an established business relationship, but from whom they would prefer not to receive telemarketing calls. In an overall scheme comprised of both the national registry and the company-specific do-not-call lists, the established business relationship exemption makes more sense and has far less tendency to "swallow the rule" than it does in a regulatory regime that only makes only the company-specific option available.

Under the current TCPA regulations, "established business relationship" calls are excluded from the provisions that prohibit a telephone solicitation to a person who has asked to be on the seller's do-not-call list, 47 C.F.R. §§ 64.1200(e)(2) & (f)(3). Thus, on the face of the current TCPA regulations, it appears that even if a consumer specifically asks to be placed on the company-specific do-not-call list, the seller or telemarketer can continue calling the consumer if it can claim an "established business relationship" with that consumer.[31] Indeed, the rulemaking

[31] The definition of "established business relationship" in the current TCPA regulations specifies that such a relationship exists only where it "has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(4) (emphasis supplied.) How "termination" occurs is not specified. Nevertheless, in adopting the current TCPA regulations, the FCC stated that "a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list. A customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation." *Report and Order on Rules and Regulations Implementing the Telephone Consumer Protection Act*, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8770, n. 63. (Oct. 16, 1992). Thus, in actuality the established business relationship exemption in the current TCPA regulations does not allow a company to call consumers who have asked to be placed on the company's do-not-call list, even though the plain language of the regulation suggests the opposite.

record in the TSR amendment proceeding shows that some companies have interpreted the TCPA regulations in this manner, suggesting that a consumer may be powerless to prevent "established business relationship" telemarketing calls.[32]

To summarize, the FTC adopted the national do-not-call registry and also decided to retain the company-specific do-not-call provisions (that were included in the original TSR in 1995). The FTC also only allowed a narrow "existing business relationship" exemption from the national do-not-call registry (but not from the company-specific do-not-call lists). The FTC believes it is important to maximize consumer choice in determining which telemarketing calls to receive, and urges the FCC to do so as well, in accordance with the Do-Not-Call Implementation Act's mandate to maximize consistency between the two agencies' regulations.

C. The FCC should consider including in its revised TCPA regulations a prohibition against denying or interfering with a person's right to be placed on the national do-not-call registry or any company-specific do-not-call list.

[32] At the FTC's June 2002 public forum on amendments to the TSR, one consumer recounted that a telemarketer calling on behalf of a well-known national retailer telephoned her, notwithstanding the fact that she was on the retailer's do-not-call list. When she questioned the telemarketer about this apparent error, the telemarketer said that the consumer had recently made a purchase at the retailer, which re-created an "established business relationship" that exempted the retailer from complying with her do-not-call request. See June 2002 Tr. I at 278-282. At least one court has ruled that a company-specific do-not-call request trumps the established business relationship under the TCPA regulations. Charvat v. Dispatch Consumer Serv., Inc., 95 Ohio St.3d 505, 2002-Ohio-2838, 769 N.E.829, (2002).

The original TSR did not expressly prohibit denying or interfering with a person's do-not-call rights. Comments received during the TSR regulatory review proceeding (which immediately preceded the TSR amendment proceeding) identified this troublesome practice.[33] Commenters reported that telemarketers hung up on them before they could assert a do-not-call request, or deployed other strategies to frustrate them when they tried to do so. Consequently, the FTC adopted Amended TSR § 310.4(b)(1)(ii), which prohibits "denying or interfering in any way, directly or indirectly, with a person's right to be placed on any [company-specific or national] registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls . . . ."

The provision reaches denying or interfering with a consumer's right to be placed on either a company-specific do-not-call list or the national do-not-call registry. As a practical matter, however, the comments revealed the practice in the context only of company-specific lists. This is because until adoption of the Amended TSR, there was no national registry, and thus no opportunity for any person to deny or interfere with consumers' sign-up efforts. The record did not reflect denial or interference with consumers' attempts to sign up for state do-not-call registries. Thus, the primary function of this provision will likely be to protect and complement the company-specific do-not-call option which, as explained above, the FTC believes to be an important component of the overall do-not-call scheme.

Section 227(c)(1) of the TCPA directs the FCC to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Pursuant to this mandate, the FCC could include a provision analogous to Amended TSR § 310.4(b)(1)(ii), and prohibit entities subject to the FCC's jurisdiction from denying or interfering with a person's right to be on a do-not-call registry. Including such a provision in the TCPA regulations would fulfill the directive of Section 3 of the Do-Not-Call Implementation Act, and would establish a "level playing field" for individuals and entities subject to the jurisdiction of either the FTC or the FCC, but not both.

[33] NPRM, 67 Fed. Reg. 4516 (Jan. 30, 2002).

D. The FCC should include a provision in its revised TCPA regulations to prohibit selling, renting, leasing, purchasing, or using any company-specific do-not-call list or any list downloaded from the national do-not-call registry "for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists."

As noted above, TCPA § 227(c)(3)(K) requires that if the FCC determines to require establishment and operation of a national database, then the TCPA regulations must prohibit the use of the database for any purpose other than compliance with the requirements of the section or of state law, and must specify methods for protection of the privacy rights of persons whose numbers are included in the database. Assuming that the FCC decides to prohibit entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a number that has been placed on the FTC's national do-not-call registry, the FCC should also adopt a provision like the one called for by TCPA § 227(c)(3)(K), even if that statutory provision is determined to be inapplicable.[34] Adoption of such a provision would be consistent with Section 3 of the Do-Not-Call Implementation Act, since the Amended TSR includes such a provision, declaring it unlawful "for any person to sell, rent, lease, purchase, or use [any company-specific do-not-call list or the national do-not-call registry] . . . for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists."[35] Amended TSR § 310.4(b)(2).

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[34] As explained in Part I of this Comment, if the FCC decides to prohibit entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a number that has been placed on the FTC's national do-not-call registry, it could interpret that action as distinguishable from requiring the establishment and operation of a single national database pursuant to TCPA § 227(c)(3), and thus as not triggering the requirements of TCPA § 227(c)(3)(A)-(L).

[35] A discussion of the FTC's reasons for adopting this provision is set forth in the

The FTC believes that it is important for all persons, not just sellers and telemarketers under FTC jurisdiction, to use the do-not-call lists properly. The Amended TSR provision applies to such parties as list brokers and other entities that do not fall within the definitions of "seller" or "telemarketer." The Amended TSR provision permits a person to use either seller-specific lists, or the national registry, not only to comply with the do-not-call requirements of the Amended TSR, but also "to prevent telephone calls to telephone numbers on such lists." This provision permits an entity not subject to the amended Rule to access the national registry to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls. The FTC urges that if the FCC decides to prohibit entities and individuals under FCC jurisdiction from initiating any outbound telephone call to a number that has been placed on the FTC's national do-not-call registry, it should also adopt a provision analogous to Amended TSR § 310.4(b)(2).

E. The FCC should retain in its revised TCPA regulations the "safe harbor" feature for sellers or telemarketers who, despite good faith efforts to comply with the do-not-call provisions, erroneously call a person who previously has asked to be placed on a company-specific do-not-call list, and expand the safe harbor to cover situations involving persons who have placed their numbers on the national do-not-call registry.

Amended TSR SBP at 4628 and is incorporated into this Comment by reference.

TCPA § 227(c)(5) provides that in any private right of action brought by a person who has received telemarketing calls that violate the TCPA do-not-call regulations, "it shall be an affirmative defense . . . that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection." The existing TCPA regulations incorporate this concept, 47 C.F.R. 64.1200(e), and the "safe harbor" in the TSR (both as originally adopted and as retained in the Amended TSR[36]) is modeled on the existing TCPA regulations. Retaining the concept of a "safe harbor" in the TCPA regulations and expanding it to encompass situations involving calls to persons who have placed their numbers on the national do-not-call registry would fulfill the directive of the Do-Not-Call Implementation Act for maximum regulatory consistency. It would also promote a "level playing field" for individuals and entities subject to the jurisdiction of either the FTC or the FCC, but not both.

[36] Specifically, Amended TSR § 310.4(b)(3) provides that a seller or telemarketer will not be liable for a TSR do-not-call violation if it can demonstrate that, as part of its routine business practice:

- It has established and implemented written do-not-call compliance procedures;
- It has trained its personnel, and any entity assisting in its compliance, in the written compliance procedures;
- It has maintained and recorded a company-specific do-not-call list;
- It uses a process to prevent telemarketing to any telephone number on either the company-specific do-not-call list, or on the national do-not-call registry (employing a version of the do-not-call registry obtained no more than three months prior to the date any call is made), and maintains records documenting this process;
- It monitors and enforces compliance with the written do-not-call compliance procedures; and
- Any subsequent call otherwise violating the do-not-call prohibitions is the result of error.

F. The FCC should include provisions in its revised TCPA regulations that prohibit abandoning any outbound telephone call, while establishing a "safe harbor" so that telemarketers need not sacrifice the use of predictive dialers.

The FTC determined that abandoning a call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice.[37] The FTC also determined that this is the type of practice that prompted Congress, in the Telemarketing and Consumer Fraud and Abuse Prevention Act, to direct the FTC to prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[38] The FTC determined that the Amended TSR rulemaking record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.[39]

Similarly, the authority granted the FCC "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object" is broad enough to encompass addressing the practice of call abandonment. Based on the record amassed in the TSR amendment rulemaking, the FTC believes that consumers strongly object to telephone solicitation calls that end after the consumer answers but before the sales representative begins a sales pitch. The TCPA's definition of "telephone solicitation" ("the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or

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[37] "An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting." 16 C.F.R. § 310.4(b)(1)(iv).

[38] 15 U.S.C. 6102(a)(3)(A).

[39] See, e.g., AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. See also Pelland-NPRM at 2.

services, which is transmitted to any person . . . ," TCPA § 227(a)(3)), does not exclude calls terminated before the pitch begins. The definition turns on the purpose in initiating the call, not on the actual delivery of a sales pitch. Thus, the definition is broad enough to provide a basis for the FCC to regulate calls that stop after a call is initiated by the caller and answered by the called party, but before a sales pitch begins.

In the NPRM that initiated the TSR amendment proceeding, the FTC explained that "abandoned calls" violate § 310.4(d) of the original Rule because such calls fail to provide the "prompt" disclosures which that provision requires.[40] "Abandoned calls" include two distinguishable scenarios: "hang up" calls, in which the telemarketer hangs up on the consumer immediately after the consumer has picked up the receiver without speaking to the consumer; and "dead air" calls, in which there is a prolonged period of silence between the consumer's answering a call and the connection of that call to a sales representative.[41] According to one consumer organization, call abandonment is "one of the most invasive practices of the telemarketing industry."[42] "Hang up" calls and "dead air" frighten consumers,[43] invade their

[40] 67 Fed. Reg. at 4524. Abandoned calls similarly fail to provide analogous disclosures required by § 64.1200(e)(2)(iv).

[41] 67 Fed. Reg. at 4522.

[42] PRC-NPRM at 3.

[43] 67 Fed. Reg. at 4523.

privacy,[44] cause some of them to struggle to answer the phone only to be hung up on,[45] and waste the time and resources of consumers working from home.[46]

[44] AARP-NPRM at 9.

[45] 67 Fed. Reg. at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

[46] PRC-NPRM at 3.

The record established that both types of abandoned calls most often arise from the use of predictive dialers, which promote telemarketers' efficiency by calling multiple consumers for every available sales representative.[47] Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the amount of time representatives spend waiting to reach a prospective customer.[48] An inevitable "side effect" of predictive dialers' functionality is that the dialer will reach more consumers than can be put through to available sales representatives.[49] In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.[50]

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[47] ABA-NPRM at 12; ATA-NPRM at 32; CADM-NPRM at 3; DialAmerica-NPRM at 22; Pelland-NPRM at 2; Sytel-NPRM at 3; Miller Study at 13; see also web site of MarkeTel, a manufacturer of predictive dialers, at http://www.predictivedialers.com/home/faq.html.

[48] ATA-NPRM at 31; ERA-NPRM at 41; MPA-NPRM at 31; NAA-NPRM at 14; Private Citizen-NPRM at 3; PMA-NPRM at 30; TeleDirect-NPRM at 2.

[49] June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

[50] NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

The Amended TSR prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under Amended TSR § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting.[51] (As explained herein, "hang up" calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Amended TSR.)

Amended TSR § 310.4(b)(4), the "safe harbor" provision, provides that the FTC will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of Amended TSR § 310.4(b)(1)(iv) if the seller or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message identifying the caller and its telephone number; and (4) the seller or telemarketer must retain records, in accordance with Amended TSR § 310.5(b)-(d), establishing compliance with Amended TSR § 310.4(b)(4)(i)-(iii).[52] The FTC's reasons for adopting the safe harbor for call abandonment are

[51] The FTC's prohibition of abandoned calls is authorized by § 6102(a)(3)(A) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, which directs the FTC to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the FTC to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the FTC to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

[52] In response to petitions filed with the FTC by DMA and ATA asserting, *inter alia*, that many telemarketers would have difficulty complying with the call abandonment safe harbor at the original effective date of March 31, 2003, the FTC postponed the effective date of this

set forth fully in the Amended TSR SBP at 4641-45. That discussion is incorporated by reference into this Comment.

provision until October 1, 2003, which is the same date the national do-not-call registry provisions become fully effective. 68 Fed. Reg. 16414 (Apr. 4, 2003).

Essentially, there is consistency between the recorded message component of the Amended TSR's call abandonment safe harbor and the existing TCPA regulations on the use of artificial or prerecorded voices to deliver a message.[53] Specifically, the TCPA regulations prohibit the initiation of "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message . . ." but expressly exclude from the scope of this prohibition any "call or message, by or on behalf of, a caller that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement." 47 C.F.R. § 64.1200(c)(2) (emphasis supplied). The term "unsolicited advertisement," in turn, is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 C.F.R. § 64.1200(f)(5). Thus, a recorded message that merely identifies the seller and provides the seller's telephone number does not violate the current TCPA regulation.[54] It also fulfills the Amended TSR's call abandonment safe harbor requirement.

[53] In fact, the Amended TSR, in footnote 7 to § 310.4(b)(4)(iii), expressly states that "this provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 C.F.R. Part 64.1200."

[54] In fact, the current TCPA regulation requires that, in situations when recorded messages are permitted, they "shall at the beginning of the message state clearly the identity of the business, individual or other entity initiating the call and . . . state clearly the telephone number or address of such business, other entity, or individual." 47 C.F.R. § 64.1200(d).

The FCC may need to eliminate the established business relationship exemption with respect to prerecorded message calls, especially if, as the FTC urges, it includes in its revised TCPA regulations provisions addressing the practice of call abandonment and creating a safe harbor. The current TCPA regulations permit telemarketers to use pre-recorded messages in calling any consumer with whom they have an "established business relationship." 47 C.F.R. §§ 64.1200(a)(2) & (c)(3). The Amended TSR's call abandonment safe harbor provision, however, permits recorded messages in no more than 3% of calls answered by a consumer where the consumer is not connected with a live sales representative within two seconds after completing his or her greeting. The TCPA does not mandate an established business relationship exemption for prerecorded messages.[55] Therefore, the statute is not an impediment for the FCC as it implements the Do-Not-Call Implementation Act's mandate for maximum regulatory consistency in this regard.

To achieve the goal of regulatory consistency mandated by the Do-Not-Call Implementation Act, the FCC should include provisions in its revised TCPA analogous to the

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[55] The TCPA, 47 U.S.C.§ 227(b)(1)(B), prohibits the use of artificial or prerecorded messages "without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)." The referenced paragraph, in turn, states that the FCC:

> may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe -
> (i) calls that are not made for a commercial purpose; and
> (ii) such classes or categories of calls made for commercial purposes as the Commission determines -
> (I) will not adversely affect the privacy rights that this section is intended to protect; **and**
> (II) do not include the transmission of any unsolicited advertisement; 47 U.S.C.§ 227(b)(2)(B) (emphasis supplied).

Thus, the statutory criteria for exemption are that a call must either (a) not be made for a commercial purpose, or (b) not adversely affect the privacy rights at the heart of the TCPA and not include any unsolicited advertisement. The current TCPA regulations exempt any call from a company that has an established business relationship with the called consumer, even if the call is made for a commercial purpose, and even if it includes an unsolicited advertisement.

Amended TSR provision that prohibit abandoning any outbound telephone call and establish a "safe harbor" so that telemarketers need not sacrifice the use of predictive dialers.

G. The FCC should consider including in its revised TCPA regulations a prohibition against causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

Section 310.4(b)(1)(i) of the Amended TSR specifies that it is unlawful to cause any telephone to ring, or engage any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. In the Statement of Basis and Purpose for the original TSR, the FTC stated with respect to § 310.4(b)(1)(i):

> [This section] prohibits causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Such a prohibition is included in the FDCPA, and the legislative history of the Telemark

eting [and Consumer Fraud and Abuse Prevention] Act states that the Commission should consider the FDCPA in establishing prohibited abusive acts or practices. . . . The Commission has taken this prohibition virtually verbatim from the FDCPA, and finds no reason to alter this language. The staff commentary to the FDCPA states that "continu

ously”’ means “making a series of telephone calls, one right after the other,” and that ‘‘repeatedly’’ means “calling with excessive frequency under the circumstances.” The Commission believes that if a telemarketer calls a consumer continuously or repeatedly, as those terms have been defined, it is presumed that the caller’s intent

was to annoy, abuse, or harass the person being called. The few courts that have ruled on this provision of the FDCPA have been silent on the intent requirement, ultimately deciding the case simply on the repeated nature of the calls.[56]

In the course of the TSR amendment proceeding, no change in this provision was proposed, and no significant comments urging any change were received. Therefore, this provision was retained unchanged in the Amended TSR.

[56] 60 Fed. Reg. 43,854 (Aug. 23, 1995).

The authorization in TCPA § 227(c)(1) for the FCC to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object" is broad enough to encompass a regulation analogous to Amended TSR § 310.4(b)(1)(i). Causing a telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass are practices that would seem to be inimical to consumers' privacy right to be free of solicitation calls to which they object. Including such a provision in the TCPA regulations would fulfill the directive of Section 3 of the Do-Not-Call Implementation Act, and would establish a "level playing field" for individuals and entities subject to the jurisdiction of either the FTC or the FCC, but not both.

III. Consistency between the Amended TSR and the TCPA regulations should be the goal, even with respect to topics not specifically addressed by the Do-Not-Call Implementation Act.

As noted, the Do-Not-Call Implementation Act specifically mandates consistency between the TCPA regulations and Amended TSR § 310.4(b). Issues relating to this express mandate are covered in the preceding sections. There are additional issues outside the strict parameters of Amended TSR § 310.4(b) – and therefore outside the scope of the Do-Not-Call Implementation Act – where consistency between the two agencies' regulations can and should be achieved to ensure that, wherever possible and practicable, the same rules apply to all competitors, whether they be under the FCC's jurisdiction, the FTC's jurisdiction, or both. The following sections discuss those issues: mandatory Caller ID transmission; and calling time restrictions for telemarketing.

A. Mandatory Transmission by Telemarketers of Caller ID Information.

Amended TSR § 310.4(a)(7) addresses transmission of Caller ID information. This section prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call." A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to

substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. To give telemarketers sufficient time to prepare to comply with this new provision, the effective date of the Caller ID provision will be January 29, 2004.

The record of the TSR amendment preceding reveals several key principles supporting the FTC's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters in the FTC's TSR amendment proceeding had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.[57] Fourth, consumers and telemarketers will both benefit from the increased accountability in telemarketing that will result from this provision.[58] Fifth, law enforcement groups will benefit from a vital new resource from the required transmission of Caller ID information in telemarketing. A full discussion of the FTC's reasons for mandating that telemarketers transmit caller ID information is set forth in the Amended TSR SBP at 4623-28 and is incorporated into this Comment by reference.[59] The FTC believes that the goals of regulatory

[57] EPIC-NPRM at 11-12.

[58] Make-A-Wish-NPRM at 6; Associations-Supp. at 7; DialAmerica-Supp. at 2.

[59] This discussion also describes the FTC's consideration of the fact that the FCC has regulated in the area of Caller ID to require carriers using SS7 to provide a mechanism by which a line subscriber can block the display of his or her telephone number of a Caller ID device. The FTC concluded that the FCC's regulation is designed to address specific calling situations, distinguishable from telemarketing, in which protecting the calling party's privacy takes on

consistency will be promoted if the FCC adopts revised TCPA provisions analogous to Amended TSR § 310.4(a)(7) to require telemarketers to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call.

B. Calling Time Restrictions for Telemarketers.

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particular urgency. See, Amended TSR SBP at 4627.

The current TCPA regulations provide that "no person or entity shall initiate any telephone solicitation to a residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location) . . . ."[60] 47 C.F.R. § 64.1200(e). When the FCC adopted this provision in 1992, it looked to the Fair Debt Collection Practices Act (FDCPA)[61] for guidance in setting reasonable calling time restrictions. The FCC stated that:

> both the record and the legislative history indicate that early morning and late night telephone solicitations are a significant nuisance to telephone subscribers. In light of the record and the legislative history, we conclude that it is in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations to invasions of residential subscriber privacy . . . . These regulations will coincide with the FDCPA prohibition against calls before the hour of 8 AM and after 9 PM, local time at the called party's location. We believe that time of day restrictions will protect consumers from objectionable calls while not unduly burdening legitimate telemarketing activity.[62]

After this FCC action, Congress in the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act directed the FTC to include in the TSR "restrictions on the hours of the

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[60] The TCPA regulations do not prohibit a telemarketer or seller from calling at <u>any time</u> if the called party is someone with whom the seller or telemarketer has an "established business relationship." This is because the regulations prohibit initiation of a "telephone solicitation" outside the specified times, but the term "telephone solicitation" is defined to exclude "established business relationship" calls. 47 C.F.R. § 64.1200(f)(3)(ii). The TSR does not exempt established business relationship calls from the calling time restrictions. Nothing on the record of the TSR amendment proceeding advocates or suggests that established business relationship calls should be permitted outside the time restrictions that apply to all other telemarketing calls. The FTC believes that the agencies' respective regulations should embody a single, simple consistent rule with respect to calling time restrictions, and urges the FCC to eliminate the exemption from calling time restrictions for established business relationship calls.

[61] "Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location." 15 U.S.C. § 1692c(a)(1).

[62] FCC Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90 (Sept. 17, 1992) at 13, ¶ 26.

day and night when unsolicited telephone calls can be made to consumers." 15 U.S.C. § 6102(a)(3)(B). Accordingly, when the Commission adopted the TSR in 1995, it included a provision that:

> without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of the Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location. TSR § 310.4(c).

In adopting this provision, the FTC noted that commenters expressed a range of views on appropriate calling times, but decided to follow the FCC's earlier determination on this issue. The FTC stated:

> [T]he FCC has established calling time hours of 8 a.m. to 9 p.m. in its regulations implementing the TCPA. By altering those permitted calling hours, the [FTC] would introduce a conflict in the federal regulations governing telemarketers. The record contains no compelling evidence to support a change that would produce such a result.[63]

This review of the history of how the FCC and the FTC have approached this issue of appropriate calling times for telemarketers reveals that both agencies have sought to maximize consistency. Nothing submitted in the FTC's recently completed proceeding to review and amend the TSR advanced any argument or evidence that would justify departure from the goal of regulatory consistency in this area.

The FTC received more than one hundred comments from consumers on this issue, the vast majority of which recommended that the calling times be contracted in some fashion. Many consumers urged that the calling times provision further restrict calls during the "dinner hour," or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children. Some commenters urged the FTC to prohibit telemarketing on Saturday, Sunday or the entire weekend. Still others urged the FTC to consider the plight of those shift workers for whom the current calling hours provide little or no

[63] 60 Fed. Reg. 43842 at 43855.

protection from calls during "sleep time." The few industry comments regarding calling times were supportive of the current hours.

After considering all these arguments, the FTC concluded that the current calling hours reflected in both the TSR and the TCPA regulations provide a reasonable window for telemarketers to reach their existing and potential customers. The FTC acknowledged that some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., but that the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, the Commission noted that consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national do-not-call registry, thus blocking unwanted calls at all times. Therefore, the Commission declined to modify the existing calling time restrictions.

The FTC believes that, absent some compelling new evidence submitted to the FCC demonstrating a need for a change in the calling times, the FCC should retain its existing calling time restrictions and maintain the consistency that both agencies have sought on this issue. In this regard, the FTC notes that there is a difference between the treatment of calling time restrictions in the TSR and in the TCPA regulations with respect to established business relationship calls. The TCPA regulations do not prohibit a telemarketer or seller from calling at <u>any time</u> if the called party is someone with whom the seller or telemarketer has an "established business relationship." This is because the regulations prohibit initiation of a "telephone solicitation" outside the specified times, but, as noted above, the term "telephone solicitation" is defined to exclude "established business relationship" calls. 47 C.F.R. § 64.1200(f)(3)(ii). By contrast, the TSR does not exempt established business relationship calls from the calling time restrictions. Nothing on the record of the TSR amendment proceeding advocates or suggests that established business relationship calls should be permitted outside the time restrictions that apply to all other telemarketing calls. The FTC believes that the agencies' respective regulations should embody a single, simple consistent rule with respect to calling time restrictions, and urges the FCC to eliminate the exemption from calling time restrictions for established business relationship calls.

IV. Conclusion

The FTC appreciates the opportunity to offer its views on how the FCC might fulfill the directive of Section 3 of the Do-Not-Call Implementation Act to maximize consistency with the Amended TSR.